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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DAVID MICHAEL SAHAKIAN,

Movant,

v.

UNITED STATES OF  
AMERICA,

Respondent.

Case Nos. EDCV 12-01221-VAP  
EDCR 02-00938-VAP

**ORDER DENYING MOTION FOR  
RELIEF UNDER 28 U.S.C. §  
2255**

**I. SUMMARY OF PROCEEDINGS**

On July 23, 2012, David Michael Sahakian ("Movant") filed a "Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody" ("Motion" or "Mot." (Doc. Nos. 1 [Civ.], 6968 [Crim.])).<sup>1</sup> On August 8, 2012, Respondent filed its Opposition to the Motion (Doc. No. 6969 [Crim.]).

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<sup>1</sup> Many of the documents filed in connection with this motion appear only on the docket in the underlying criminal case, ED CR 02-00938 VAP. Citations to [Civ.] indicate documents on the docket for the Motion. Citations to [Crim.] indicate documents on the docket for the underlying criminal case.

## II. BACKGROUND FACTS

After a jury trial, Movant was found guilty of one count of RICO Conspiracy (18 U.S.C § 1962(d)). (Doc. Nos. 6671 [Crim.]; 6764 [Crim.]) On April 20, 2009, the Court sentenced him to a 240-month term of imprisonment, along with an 3 year period of supervised release (J. & Commitment Order (Doc. No. 6764 [Crim.])).

Movant filed a notice of appeal of his conviction and sentence to Ninth Circuit Court of Appeals on April 28, 2009. (Doc. No. 6765 [Crim.].) The Court of Appeals affirmed the District Court's judgment and issued its mandate on August 9, 2011. (See Doc. No. 6949 [Crim.].)

## III. DISCUSSION

Section 2255 authorizes the Court to "vacate, set aside or correct" a sentence of a federal prisoner that "was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). Claims for relief under § 2255 must be based on some constitutional error, jurisdictional defect, or an error resulting in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." United States v. Timmreck, 441 U.S. 780, 783-84 (1979). If the record clearly indicates that a movant does not have a claim or that he has asserted "no more than conclusory allegations, unsupported by facts and refuted by the record," a district court may deny a §

1 2255 motion without an evidentiary hearing. United States  
2 v. Quan, 789 F.2d 711, 715 (9th Cir. 1986); see also  
3 United States v. Chacon-Palomares, 208 F.3d 1157, 1159  
4 (9th Cir. 2000) ("When a prisoner files a § 2255 motion,  
5 the district court must grant an evidentiary hearing  
6 '[u]nless the motion and the files and records of the  
7 case conclusively show that the prisoner is entitled to  
8 no relief.'" (quoting 28 U.S.C. § 2255)).

9  
10 **A. Grounds for Relief**

11 Movant raises the following grounds for relief:

- 12 1. the Court's finding that Movant was a career  
13 offender was improper because the jury did not  
14 specifically find that Movant had committed the  
15 predicate act upon which the career offender  
16 finding was made, in violation of Appendi v.  
17 New Jersey, 530 U.S. 466 (2000) (Mot. at 3-4);
- 18 2. the RICO conspiracy statute is overbroad because  
19 it punishes mere thoughts and not overt acts  
20 (Mot. at 5);
- 21 3. the Court erred by admitting evidence that he  
22 was involved in a plot to bomb a California  
23 State Prison, because that evidence was false  
24 and the Government knew it was false (Mot.  
25 at 6);
- 26 4. his trial counsel's failure to call witnesses to  
27 rebut evidence regarding the bomb plot resulted  
28

1 in the necessity to testify on his own behalf  
2 (Mot. at 7); and

3 5. the Court's use of a 1995 drug conviction as a  
4 basis for a finding that he was a career  
5 offender violated the statute of limitations; he  
6 did not know this until the Court of Appeals  
7 held that this argument had been waived because  
8 it was not brought up at trial (Mot at 8).

9  
10 **B. Procedural Bars**

11 At the outset, the Court notes that two of Movant's  
12 grounds for relief are procedurally barred because they  
13 were previously raised and rejected on direct appeal.  
14 Moreover, two of Movant's three remaining grounds for  
15 relief are procedurally defaulted because they could have  
16 been raised on direct appeal but were not.

17  
18 **1. Grounds One and Five Are Procedurally Barred**  
19 **Because They Were Raised and Rejected on Direct**  
20 **Appeal**

21 "When a defendant has raised a claim and has been  
22 given a full and fair opportunity to litigate it on  
23 direct appeal, that claim may not be used as basis for a  
24 subsequent § 2255 petition." United States v. Hayes, 231  
25 F.3d 1132, 1139 (9th Cir. 2000); see also United States  
26 v. Currie, 589 F.2d 993, 995 (9th Cir. 1979). This "law  
27 of the case" doctrine only applies where the issue in  
28

1 question was "decided explicitly or by necessary  
2 implication in [the] previous disposition." United  
3 States v. Lummi Indian Tribe, 235 F.3d 443, 452 (9th Cir.  
4 2000)(alteration in original)(quoting Liberty Mutual Ins.  
5 Co. v. EEOC, 691 F.2d 438, 441 (9th Cir. 1982)). "A  
6 collateral attack is the 'same case' as the direct appeal  
7 proceedings for purposes of the law of the case  
8 doctrine." United States v. Jingles, 702 F.3d 494, 500  
9 (9th Cir. 2012) cert. denied, 133 S. Ct. 1650,  
10 (2013)(citing Odom v. United States, 455 F.2d 159, 160  
11 (9th Cir. 1972)).

12  
13 The Court may only depart from the law of the case  
14 doctrine where: "1) the first decision was clearly  
15 erroneous; 2) an intervening change in the law has  
16 occurred; 3) the evidence on remand is substantially  
17 different; 4) other changed circumstances exist; or 5) a  
18 manifest injustice would otherwise result." United  
19 States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997).

20  
21 Movant alleges that none of the grounds for relief  
22 were raised on direct appeal. (See, e.g., Mot. at 4  
23 (Ground One), 8 (Ground Five).) He is incorrect. Ground  
24 One claims that the Court's finding Movant was a career  
25 offender was in violation of the Supreme Court's holding  
26 in Apprendi v. New Jersey, 530 U.S. 466 (2000)(as cited  
27 by Southern Union Co. v. United States, 132 S. Ct. 2344  
28

1 (2012)), because the jury did not return a special  
2 verdict finding he had committed the predicate act of  
3 drug distribution. (Mot. at 4.) As there was evidence  
4 that Movant participated aspects of the conspiracy that  
5 would not subject him to a career offender enhancement,  
6 for example, gambling and passing notes, Movant argues  
7 that it was inappropriate for the Court to use the  
8 allegation that he trafficked drugs in 1995 to support a  
9 finding that he was a career offender. (Id.)

10  
11 To the extent Movant makes this argument, it is  
12 barred because Movant previously made this argument on  
13 appeal. See United States v. Sahakian, 446 F. Appx. 861,  
14 862 (9th Cir. 2011) ("Sahakian argues that the district  
15 court could not sentence him based on a finding of drug  
16 distribution when there was no special verdict form and  
17 there was evidence that would have warranted a lesser  
18 penalty.").

19  
20 Similarly, Ground Five claims that the Court erred in  
21 even considering the 1995 drug distribution allegation in  
22 its finding that Movant was a career offender because  
23 those allegations were outside the statute of  
24 limitations. (Mot. at 8.) Again, this argument is  
25 substantially the same as the argument Movant previously  
26 made on direct appeal. See Sahakian, 446 F. Appx. at 862  
27 ("By not raising to the district court his claim that the  
28

1 five-year statute of limitations imposed by 18 U.S.C.  
2 § 3282 barred his RICO conspiracy conviction, Sahakian  
3 has waived that argument." ).

4  
5 Thus, despite Movant's attempts to re-frame these  
6 claims as unconsidered on direct appeal, Grounds One and  
7 Five are the same as those that were presented to and  
8 rejected by the Ninth Circuit. Movant also has made no  
9 attempt to show why the Court should depart from the law  
10 of the case doctrine to disregard the procedural bar.  
11 Thus, because these claims were previously raised on  
12 direct appeal, the Court finds that they are procedurally  
13 barred.

14  
15 **2. Grounds Two and Three Are Procedurally Defaulted**  
16 **Because They Were Not Raised on Direct Appeal**

17 Generally, claims not raised on direct appeal may not  
18 be raised in a motion pursuant to § 2255 unless the  
19 petitioner shows cause and prejudice, "actual innocence,"  
20 or if the claim is related to an ineffective assistance  
21 of counsel claim. Massaro v. United States, 538 U.S.  
22 500, 504 (2003); see also Bousley v. United States, 523  
23 U.S. 614, 621-622 (1998).

24  
25 Movant concedes that Grounds Two and Three were not  
26 raised on direct appeal. (Mot. at 5 (Ground Two), 6  
27 (Ground Three).) Movant has not alleged, much less  
28

1 shown, any cause and prejudice, nor does he claim that  
2 his counsel was ineffective as to those claims.  
3 Therefore, because Movant had the opportunity to raise  
4 these claims on direct appeal but did not, Grounds Two  
5 and Three are procedurally defaulted, and the Motion must  
6 be denied as to these claims.

7  
8 **B. All of Movant's Grounds for Relief Are Without Merit**

9 Not only are four of Movant's five claims  
10 procedurally barred, all of the claims in the Motion are  
11 without merit. The Court will address each of Movant's  
12 grounds for relief in turn.

13  
14 **1. The Jury Was Not Required to Indicate What**  
15 **Predicate Acts Formed the Basis of Its Verdict**  
16 **for RICO Conspiracy**

17 As his first ground for relief, Movant argues that  
18 because the jury did not return a special verdict  
19 specifically finding that Movant was guilty of conspiracy  
20 because he had distributed drugs, the Court erred when it  
21 used the drug distribution allegation to sentence him as  
22 a career offender, in violation of the Supreme Court's  
23 holding in Apprendi v. New Jersey, as cited by Southern  
24 Union Co. v. United States.



1 To the extent Movant seeks to renew the argument that  
2 his sentence was contrary to Apprendi, that contention  
3 was considered and rejected by the Ninth Circuit because  
4 Movant was sentenced within the statutory maximum.  
5 Sahakian, 446 F. Appx. at 862.

6  
7 Movant appears to contend that the Supreme Court's  
8 holding in Southern Union Co. v. United States, 132 S.  
9 Ct. 2344 (2012), now dictates a different result. (Mot.  
10 at 4.) This argument lacks merit as well; nothing in  
11 Southern Union dictates a different result here. In  
12 Southern Union, the Supreme Court stated "[t]he Sixth  
13 Amendment reserves to juries the determination of any  
14 fact, other than the fact of a prior conviction, that  
15 increases a criminal defendant's maximum potential  
16 sentence." Southern Union, 132 S. Ct. at 2348 (citing  
17 Apprendi v. New Jersey, 530 U.S. 466 (2000)).

18  
19 As Respondent points out, however, Southern Union  
20 merely extended the right to a jury determination in the  
21 case of serious criminal fines. (Opp'n at 6-7.) As  
22 Movant was sentenced to prison and fines were not at  
23 issue here, Southern Union is inapposite. Furthermore,  
24 as there was no increase in Movant's maximum potential  
25  
26  
27  
28

1 sentence, Movant is not entitled to relief on his claim  
2 that his sentence violated Appendi. Accordingly, Movant  
3 is not entitled to relief on Ground One.

4  
5 **2. Movant's Claim that the RICO Conspiracy Statute**  
6 **Is Overbroad Is Without Merit**

7 In his second ground for relief, Movant argues that  
8 the statute he was convicted under, the RICO conspiracy  
9 statute, is overbroad because it criminalizes mere  
10 thoughts and not overt acts. (Mot. at 5.)

11  
12 To be convicted under a conspiracy statute such as 18  
13 U.S.C. § 1962(d), the conspirator "must intend to further  
14 an endeavor which, if completed, would satisfy all of the  
15 elements of a substantive criminal offense." Salinas v.  
16 United States, 522 U.S. 52, 65 (1997). "[I]t suffices  
17 [under § 1962(d)] that [the conspirator] adopt the goal  
18 of furthering or facilitating the criminal endeavor."  
19 Id. A conspirator need not commit the substantive  
20 criminal offense in order to be guilty of a RICO  
21 conspiracy; it is sufficient that the conspirator "knew  
22 about and agreed to facilitate the scheme." United  
23 States v. Fiander, 547 F.3d 1036, 1041 (9th Cir. 2008)  
24 (citing Salinas, 522 U.S. at 66).

1        Salinas forecloses the argument that an overt act is  
2 required to be convicted of a RICO conspiracy. In that  
3 case, the Supreme Court held "[t]here is no requirement  
4 of some overt act or specific act in [§ 1962(d)], unlike  
5 the general conspiracy provision applicable to federal  
6 crimes, which requires that at least one of the  
7 conspirators have committed an 'act to effect the object  
8 of the conspiracy.'" Salinas, 522 U.S. at 63 (internal  
9 citation omitted). Thus, when contemplating a RICO  
10 conspiracy charge the jury "need not specify the  
11 predicate racketeering acts that the defendant agreed  
12 would be committed." United States v. Randall, 661 F.3d  
13 1291, 1297 (10th Cir. 2011). Therefore, to the extent  
14 Movant argues that the jury was required to find that he  
15 had committed a specific, overt act in order to convict  
16 him under § 1962(d), his claim is without merit.

17  
18        Furthermore, to the extent Movant claims the RICO  
19 conspiracy statute is unconstitutional, that claim is  
20 similarly meritless, given the Supreme Court's approval  
21 of § 1962(d) as discussed above. In any case, numerous  
22 courts have upheld the constitutionality of the RICO  
23 statute. United States v. DeRosa, 670 F.2d 889, 895 (9th  
24 Cir. 1982)("[Claims that RICO is unconstitutional have]  
25 been rejected not only by this circuit, but also by every  
26 other circuit that has considered it. It merits no  
27 further discussion."); see also, United States v.

1 Dischner, 974 F.2d 1502, 1508, (9th Cir. 1992)  
2 (collecting cases) overruled on other grounds by United  
3 States v. Morales, 108 F.3d 1035 n.1 (9th Cir. 1997) (en  
4 banc). Accordingly, Movant is not entitled to relief on  
5 Ground Two.

6  
7 **3. Movant Is Not Entitled to Relief on His Claim**  
8 **That Perjured Testimony Was Used to Convict Him**

9 Movant's third ground for relief claims that he was  
10 convicted using perjured testimony, the falsity of which  
11 was known to the Government at the time. (Mot. at 6.)  
12 Though Movant frames this issue as a governmental use of  
13 perjured testimony, that formulation overstates the  
14 nature of this claim. The true nature of this claim, as  
15 noted by Respondent, is a complaint by Movant that a  
16 conflict in the evidence was resolved against him by the  
17 jury. (Opp'n at 8.)

18  
19 Movant claims the Government knowingly proffered  
20 perjurious testimony regarding his involvement in a plot  
21 to bomb a California State Prison. (Mot. at 6.)  
22 According to Movant, there was no evidence of his  
23 involvement in the plot in his "central file," but the  
24 Government introduced this evidence through the use of a  
25 witness, Healy. (Id.)

1       It is well-settled that the Government may not  
2 knowingly use false evidence to obtain a criminal  
3 conviction. Hayes v. Brown, 399 F.3d 972, 978 (9th Cir.  
4 2005) (citing Napue v. Illinois, 360 U.S. 264, 269  
5 (1959)). "Indeed, if it is established that the  
6 government knowingly permitted the introduction of false  
7 testimony reversal is 'virtually automatic.'" Hayes, 399  
8 F.3d at 978 (quoting United States v. Wallach, 935 F.2d  
9 445, 456 (2d Cir. 1991)(citation omitted)).

10  
11       To prevail on a claim that the Government used false  
12 evidence to obtain a conviction, Movant must show "that  
13 (1)the testimony (or evidence) was actually false, (2)  
14 the prosecution knew or should have known that the  
15 testimony was actually false, and (3) that the false  
16 testimony was material." United States v. Zuno-Arce, 339  
17 F.3d 886, 889 (9th Cir. 2003)(citing Napue, 360 U.S. at  
18 269-71).

19  
20       Movant falls well short of meeting this burden. The  
21 only evidence Movant proffers is his bare assertion that  
22 he was not involved with the bomb plot, and that Healy's  
23 testimony to the contrary was perjurious. (Mot. at 6.)  
24 Movant does not supply or point to any evidence  
25 indicating that Healy's testimony was false, much less  
26 that the Government proffered Healy's testimony knowing  
27 it was false. Such bare allegations "fall far short of  
28

1 showing that the witnesses in question perjured  
2 themselves, much less that the government knowingly  
3 allowed them to do so." United States v. Casas, 425 F.3d  
4 23, 45 (1st Cir. 2005).

5  
6 The Court agrees with Respondent's characterization  
7 of this claim, namely, that Movant merely points to a  
8 conflict in the evidence as his sole basis for relief.  
9 It is the province of the jury to "resolve conflicts in  
10 the testimony, to weigh the evidence, and to draw  
11 reasonable inferences from basic facts to ultimate  
12 facts." Jackson v. Virginia, 443 U.S. 307, 319 (1979).  
13 Here, the jury resolved a conflict in the testimony  
14 against Movant; the jury's resolution of conflict in  
15 testimony against Movant is not a ground for relief.  
16 Accordingly, Movant is not entitled to relief on Ground  
17 Three.

18  
19 **4. To the Extent Ground Four States a Claim for**  
20 **Relief, It Is Meritless**

21 As his fourth claim for relief, Movant argues that he  
22 was forced to take the stand to rebut Healy's testimony  
23 because his attorney refused to call two rebuttal  
24 witnesses, Michael McElhany and Mark Nyquist. (Mot.  
25 at 7.) It is unclear if Movant's fourth ground states a  
26 claim for relief at all.

1        Construing the claim liberally, it appears Movant is  
2 asserting that his trial counsel was ineffective for  
3 refusing to call McElhany and Nyquist to rebut Healy's  
4 testimony. As the Court construes this claim as one  
5 alleging ineffective assistance of counsel, it is not  
6 procedurally barred for failure to raise it on direct  
7 appeal. See Massaro, 538 U.S. at 504 (2003). To the  
8 extent Movant makes this argument, however, the Court  
9 finds that it is meritless.

10  
11        To establish ineffective assistance of counsel,  
12 Movant must prove (1) "counsel's representation fell  
13 below an objective standard of reasonableness," and (2)  
14 there is a reasonable probability that, but for counsel's  
15 errors, the result of the proceeding would have been  
16 different. Strickland v. Washington, 466 U.S. 688, 694  
17 (1984). "A reasonable probability is a probability  
18 sufficient to undermine confidence in the outcome." Id.  
19 at 694. Under the second component, Petitioner must  
20 demonstrate his attorney's errors rendered the result  
21 unreliable or the proceedings fundamentally unfair.  
22 Fretwell v. Lockhart, 506 U.S. 364, 372 (1993);  
23 Strickland, 466 U.S. at 694.

24  
25        A claim of ineffective assistance of counsel requires  
26 proof of both of these elements. "[A] court need not  
27 determine whether counsel's performance was deficient  
28

1 before examining the prejudice suffered by the  
2 defendant. . . . If it is easier to dispose of an  
3 ineffectiveness claim on the ground of lack of sufficient  
4 prejudice . . . that course should be followed."  
5 Strickland, 466 U.S. at 697.

6  
7 Conclutory allegations not supported by specifics do  
8 not warrant relief on ineffective assistance of counsel  
9 claims. James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994).  
10 The relevant inquiry is not what counsel could have  
11 pursued but whether the choices that were made were  
12 reasonable. Turner v. Calderon, 281 F.3d 851, 877 (9th  
13 Cir. 2002). The standard of review "must be highly  
14 deferential" and must include "a strong presumption that  
15 counsel's conduct falls within a wide range of reasonable  
16 professional assistance." Strickland, 466 U.S. at 689-  
17 90.

18  
19 Movant must also show he suffered prejudice under the  
20 "reasonable probability of a different outcome" test.  
21 Strickland, 466 U.S. at 687-94. The prejudice  
22 must be such that it "so undermined the proper  
23 functioning of the adversarial process that the trial  
24 cannot be relied on as having produced a just result."  
25 Id. at 686.



1 Movant does not meet the burden of proving  
2 ineffective assistance of counsel under Strickland.  
3 Though Movant takes umbrage with his trial counsel's  
4 refusal to call McElhany and Nyquist, he does not allege  
5 that this decision fell short of an "objective standard  
6 of reasonableness." This alone is fatal to Movant's  
7 ineffective assistance of counsel claim.

8  
9 Additionally, Movant's only allegation of prejudice  
10 is that he was forced to testify on his own behalf to  
11 rebut the Government's evidence of his involvement in  
12 Aryan Brotherhood conspiracies. Movant provides no  
13 evidence or support as to why his testimony caused him  
14 prejudice. Rather, movant only claims that the testimony  
15 of McElhany and Nyquist may have rebutted two claims: (1)  
16 that Movant was involved in a plot to bomb a California  
17 State Prison and (2) Movant's involvement in conspiracy  
18 to murder a black inmate. (See Mot. at 7; Opp'n at 11.)  
19 As noted by Respondent, the evidence proffered by the  
20 Government at trial regarding Movant's involvement in  
21 crimes committed by the Aryan Brotherhood consisted of  
22 much more than those two incidents, however. The  
23 Government presented evidence of Movant's involvement in  
24 "murder, two attempts, two conspiracies, and a drug  
25 distribution conspiracy." (Opp'n at 12.) Therefore,  
26 even if McElhany and Nyquist had rebutted some evidence  
27 of Movant's involvement, there was still a wealth of  
28

1 other evidence connecting Movant to crimes committed by  
2 the Aryan Brotherhood.

3  
4 Movant has not proven that any alleged prejudice from  
5 his testimony in combination with his trial counsel's  
6 refusal to call McElhany and Nyquist would have resulted  
7 in a "reasonable probability of a different outcome."  
8 Accordingly, Movant is not entitled to relief on Ground  
9 Four.

10  
11 **5. Movant Is Not Entitled to Relief on His Claim**  
12 **That the Court Relied Upon Information Outside**  
13 **the Statute of Limitations at Sentencing**

14 Finally, Movant claims that it was error for the  
15 Court to sentence him as a career offender because the  
16 crime relied upon by the Court to make that finding was  
17 outside the statute of limitations. (Mot. at 8.)  
18 Further, Movant also claims that his trial counsel failed  
19 to object to the finding that Movant was a career  
20 offender, thereby waiving what might have been a  
21 meritorious argument on appeal. (Id.; see also,  
22 Sahakian, 446 F. Appx. at 863.) The Court will construe  
23 the second aspect of this claim as an allegation of  
24 ineffective assistance of counsel. The Court finds that  
25 neither aspect of this claim entitles Movant to relief.

1 As discussed above, in order to prove that his  
2 counsel was ineffective, Movant must show that his trial  
3 counsel's performance fell short of an "objective  
4 standard of reasonableness" and that the deficient  
5 performance was prejudicial to Movant's defense.  
6 Strickland, 466 at 694. When considering trial counsel's  
7 performance in this context, failure to make a futile  
8 objection or motion does not amount to ineffective  
9 assistance of counsel. Brown v. Anderson, 164 F.3d 629,  
10 at \*11 (9th Cir. 1998) (unpublished) (citing James, 24  
11 F.3d at 27). As discussed below, any objection to the  
12 Court's consideration of these allegations as being  
13 outside the statute of limitations would have been  
14 meritless; hence, his counsel's performance was not  
15 deficient, and therefore Movant is not entitled to relief  
16 on his ineffective assistance of counsel claim.

17  
18 The thrust of Movant's argument is that he was found  
19 to be a career offender based upon an allegation that he  
20 distributed drugs at the United States Penitentiary in  
21 Leavenworth, Kansas, in 1995, which was outside the  
22 statute of limitations. (Mot. at 8.) Under 18 U.S.C.  
23 § 3282, the statute of limitations for non-capital  
24 federal offenses is five years. See 18 U.S.C. § 3282.  
25 Thus, according to Movant, an allegation that he  
26 distributed drugs in 1995 was barred by the statute of  
27  
28

1 limitations, as the indictment in this case was not  
2 returned until 2002. (Mot. at 8.) Movant is incorrect.

3  
4 First, was no indication that the jury relied solely  
5 upon the 1995 drug allegation as evidence of Movant's  
6 involvement in the RICO conspiracy. As discussed above,  
7 the record indicates that Movant was involved in other  
8 criminal activities well after 1995, any of which could  
9 have supported the jury's verdict. (See Opp'n at 8, 15-  
10 17.)

11  
12 Moreover, the indictment accused Movant of  
13 participating in an ongoing conspiracy of racketeering  
14 activity "from a date unknown to the Grand Jury and  
15 continuing to at least July 25, 2002." (First  
16 Superseding Indictment (Doc. No. 2295 [Crim.]) at 41.)  
17 RICO conspiracy is an ongoing crime. As stated by the  
18 Second Circuit:

19 A particular defendant need not commit or agree  
20 to commit a racketeering act within the five  
21 year limitations period. Instead, as with other  
22 conspiracies, the crime of RICO conspiracy is  
23 not complete until the purposes of the  
24 conspiracy have been accomplished or abandoned,  
25 and the government need only prove that the  
26 conspiracy continued to within five years of the  
27 indictment.

1 United States v. Rastelli, 870 F.2d 822, 838 (2d Cir.  
2 1989).

3  
4 In the opinion on Movant's direct appeal, the Ninth  
5 Circuit made a similar note:

6 We do not suggest that Sahakian's cessation of  
7 this particular activity [i.e., the Levenworth  
8 drug distribution allegations] makes any  
9 difference in the outcome. He points to nothing  
10 in the record to show that the RICO conspiracy  
11 of which he was convicted was completed or  
12 abandoned over five years before he was  
13 indicted. The indictment charged that it  
14 continued to 2002, and there is substantial  
15 evidence that he was involved in the conspiracy  
16 well past 1995.

17 Sahakian, 446 F. Appx. at 863 n.3.

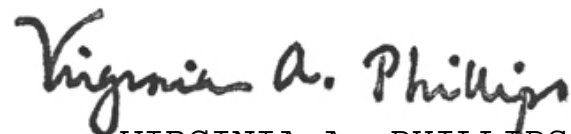
18  
19 Movant was accused of participating in an ongoing  
20 racketeering conspiracy that persisted until at least  
21 within a month of the return of the Indictment on August  
22 28, 2002. (Indictment (Doc. No. 1 [Crim.]) at 1.) Thus,  
23 to the extent they were considered by the Court, the 1995  
24 drug allegations were properly considered and not outside  
25 of the statute of limitations. As an objection to the  
26 consideration of such evidence would have been futile,  
27 Movant's trial counsel did not err by not objecting.

1 Accordingly, Movant is not entitled to relief on Ground  
2 Five.

3  
4 **IV. CONCLUSION**

5 Movant has not shown he is entitled to relief on any  
6 of the grounds raised in his Motion. Hence, the Court  
7 DENIES the Motion and orders this action dismissed with  
8 prejudice.

9  
10  
11 Dated: August 23, 2013

  
VIRGINIA A. PHILLIPS  
United States District Judge